Supreme Court, U. S.
FILED
APR 24 1978
MICHAEL RODAK, JR., C

No. 77-1519

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

LANSING BOARD OF EDUCATION, *et al.*,

Petitioners,

vs.

N. A. A. C. P., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

FRED C. NEWMAN

NEWMAN & MACKAY

510 Stoddard Building
Lansing, Michigan 48933

Attorneys for Petitioners

PHILIP B. KURLAND

Two First National Plaza
Chicago, Illinois 60603
Telephone: (312) 372-2345

Of Counsel

AMERICAN BRIEF AND RECORD COMPANY, 125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — PHONE 458-5326

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT —	
1. The Question Of The Obligation Of The Lower Federal Courts To Follow This Court's Ruling In *Dayton Board Of Education* v. *Brinkman* Is An Important and Recurring Issue Of Paramount Importance To The Administration Of The Federal Judicial System	4
2. The Determination By The Courts Below That "Racial Balance" Should Be The Standard For Judicial Remedy In A School Desegregation Case Is Inconsistent With The Rulings Of This Court And In Conflict With The Judgment Of The Court Of Appeals For The Third Circuit	7
CONCLUSION	8

APPENDICES

Page

APPENDIX "A"

United States Court of Appeals for the Sixth Circuit Order of February 8, 1978 ..... 1a

APPENDIX "B"

Opinion of Hon. Noel P. Fox re Remedy Stated from the Bench on May 3, 1976 ..... 2a

APPENDIX "C"

Order Regarding Final Desegregation Plan 3a

APPENDIX "D"

Excerpts from Testimony of Dr. I. Carl Candoli, Superintendent of Schools of Lansing School District 10a

CITATIONS

Cases:

Page

Austin Independent School Dist. v. *United States*, 429 U.S. 990 (1976) 3-4

Brennan v. *Armstrong*, 433 U.S. 672 (1977)..... 3

Dayton Board of Education v. *Brinkman*, 433 U.S. 406 (1977) 2, 3, 5, 6

Evans v. *Buchanan*, 555 F.2d 373 (3d Cir. 1977).... 7

Johnson v. *San Francisco Unified School Dist.*, 500 F.2d 349, 351 (9th Cir. 1974)..... 5

Metropolitan Housing Development Corp. v. *Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).... 5

Milliken v. *Bradley*, 418 U.S. 717, 94 S Ct. 3125..... 7

School District of Omaha v. *United States*, 433 U.S. 667 (1977) 3

Soria v. *Oxnard School District Board of Trustees*, 488 F.2d 579 (9th Cir. 1973) 5

United States v. *School District of Omaha*, 565 F.2d 127 (8th Cir. 1977) 5

United States v. *Texas Education Agency*, 564 F.2d 162 (5th Cir. 1977) 5

Village of Arlington Heights v. *Metropolitan Housing & Development Corp.*, 429 U.S. 252 (1977) 3

Washington v. *Davis*, 426 U.S. 229 (1976) 3, 5

Miscellaneous:

28 U.S.C. §1254 (1) 2

No. 77-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

LANSING BOARD OF EDUCATION, *et al.*,

Petitioners,

vs.

N. A. A. C. P., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Petitioners respectfully request that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled cause.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit and a memorandum in support thereof were filed on 8 February 1978. The memorandum is unreported and is set forth in the Appendix hereto at p. 1a. The oral opinion of the District Court appears in the Appendix at p. 2a. The Order of the District Court is set forth in the Appendix hereto at pp. 3a to 4a.

In earlier proceedings the Court of Appeals for the Sixth Circuit entered judgment affirming the trial court's finding of liability. 559 F.2d 1042 (6th Cir. 1977), cert. den. ..... U.S. ....., 98 S. Ct. 635, 54 L.Ed.2d 491 (12 December 1977). The District Court opinion from which that appeal was taken is reported at 429 F. Supp. 583 (W.D. Mich. 1976). The Court of Appeals judgment affirming the grant of a preliminary injunction is reported at 485 F.2d 569 (6th Cir. 1973).

JURISDICTION

The judgment of the Court of Appeals was rendered on 8 February 1978. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a Court of Appeals disregard the requirement established by this Court in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977), that the trial court make findings of fact as to the "incremental segregative effect"

of any violation found and then tailor the remedy to afford a cure for such incremental effect?

2. Is a remedy valid that fixes quotas for all grammar schools in Lansing so that none has more than 45% or less than 10% minority pupils?

STATEMENT

Lansing is not now and never has been a district of *de jure* segregation. It is a district in which the neighborhood school policy has been consistently followed. And, as in most cities, there have been demographic changes not attributable to school board actions which have caused some schools to change their racial makeup to reflect the predominant racial characteristics of the changing neighborhoods. The primary charge against the petitioners here is their failure to combat these demographic changes by maintaining racial balance in schools where changed neighborhoods have made black school populations predominant.

The trial court would require all grammar schools in the district to approximate the racial makeup of the entire district. The total black school population in Lansing was about 30%. The court demanded that no school have less than 10% minority pupils or more than 45% minority pupils.

On the earlier appeal on the "liability" question, the Court of Appeals for the Sixth Circuit, despite the rulings of this Court in, *inter alia, Washington* v. *Davis,* 426 U.S. 229, 242 (1976); *Village of Arlington Heights* v. *Metropolitan Housing & Development Corp.,* 429 U.S. 252, 264-65 (1977); *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 413 (1977); *School District of Omaha* v. *United States,* 433 U.S. 667, 668-69 (1977); *Brennan* v. *Armstrong,* 433 U.S. 672, 672-73 (1977); *Austin Independent School Dist.* v.

United States, 429 U.S. 990 (1976), held that the necessary intent may be derived exclusively from the "effect" of the school board's actions or inactions. 559 F.2d 1042, at 1047.

On the second appeal, the one to which this petition is directed, the Court of Appeals summarily dismissed the requirement of *Dayton, supra,* that the remedy be framed to cure the "incremental segregative effect" of the alleged violations. There were no findings as to the "incremental segregative effect," yet the Court of Appeals ruled:

> While the district court did not make findings on the "incremental segregative effect" of these violations, we conclude that the remedy imposed was only "designed to redress" the effect of the violations found. (App., p. 1a)

It is to this patent disregard of the rulings of this Court that this petition is directed.

REASONS FOR GRANTING THE WRIT

1. THE QUESTION OF THE OBLIGATION OF THE LOWER FEDERAL COURTS TO FOLLOW THIS COURT'S RULING IN *DAYTON BOARD OF EDUCATION* v. *BRINKMAN* IS AN IMPORTANT AND RECURRING ISSUE OF PARAMOUNT IMPORTANCE TO THE ADMINISTRATION OF THE FEDERAL JUDICIAL SYSTEM.

The Court of Appeals for the Sixth Circuit, by finessing this Court's rulings on the requirement of "intent" and the requirement that the remedy be confined to curing constitutional violations by eliminating those "incremental segregative effects" specifically delineated by the trial court, has imposed upon petitioners an unwarranted obli-

gation to create and maintain a "racially balanced" school system.

The Sixth Circuit, like the Fifth, *United States* v. *Texas Education Agency,* 564 F.2d 162 (5th Cir. 1977), and the Eighth, *United States* v. *School District of Omaha,* 565 F.2d 127 (8th Cir. 1977), has rejected this Court's rulings, see cases cited at pp. 3-4, *supra,* that the test for constitutional violations requires "segregatory intent" and not merely "segregatory effect," by finding the necessary intent in the effect. There is thus a conflict among the circuits on this point. See *Metropolitan Housing Development Corp.* v. *Arlington Heights,* 558 F.2d 1283, 1288 (7th Cir. 1977); *cf. Soria* v. *Oxnard School District Board of Trustees,* 488 F.2d 579, 585 (9th Cir. 1973); *Johnson* v. *San Francisco Unified School Dist.,* 500 F.2d 349, 351 (9th Cir. 1974).

By the decision below, the Sixth Circuit has compounded its flouting of this Court's rulings by rejecting the requirement that the trial court make findings of the "incremental segregative effects" of these alleged constitutional violations and limit the remedy to curing the wrongdoing.

There can be no doubt of this Court's directions nor any doubt that the Sixth Circuit has refused to follow them. This Court said in *Dayton,* 433 U.S. at 407:

> The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased [here it never existed], is to first determine whether there was any action in the conduct or business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington* v. *Davis,* [426 U.S. 229 (1976)]. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, sub-

> ject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been systemwide impact may there be a systemwide remedy. *Keyes* [v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 213 (1973)].

The Sixth Circuit, cavalierly disregarding this mandate, ruled:

> While the district court did not specifically make findings on the "incremental segregative effect" of these violations, we conclude that the remedy imposed was only "designed to redress" the effect of the violations found. *Dayton Board of Education* v. *Brinkman,* [433 U.S. 406, 420] (1977), Slip Opinion at 13-14. [App. at 1a]

In the absence of specific findings as to the "incremental segregative effect," neither the trial court nor the Court of Appeals could determine the proper scope of the remedy.

Nothing less is at stake in this case than whether the rulings of this Court shall be "the supreme law of the land." The lower federal courts must not be free to determine for themselves whether or not to follow this Court's judgments.

2. THE DETERMINATION BY THE COURTS BELOW THAT "RACIAL BALANCE" SHOULD BE THE STANDARD FOR JUDICIAL REMEDY IN A SCHOOL DESEGREGATION CASE IS INCONSISTENT WITH THE RULINGS OF THIS COURT AND IN CONFLICT WITH THE JUDGMENT OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

The conflict between the decision below and the rulings of this Court and of the Third Circuit is made patent by a quotation from the decision of the Third Circuit in *Evans* v. *Buchanan,* 555 F.2d 373, 380 (3d Cir. 1977):

> The Supreme Court has clearly stated that "desegregation in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade, or classroom.'" *Milliken* v. *Bradley, supra,* 418 U.S. [717] at 741, 94 S. Ct. at 3125. We are not free to ignore that statement. Accordingly, and to avoid any possible misunderstanding, we expressly disapprove the 10-35% enrollment criterion, and we specifically hold that no particular racial balance will be required in any school, grade, or classroom.

The conflict between *Milliken* and the Third Circuit, on the one hand, and the remedy afforded below on the other, requires resolution by this Court, by reversing the judgment below.

CONCLUSION

The Court should grant this petition and reverse the judgment with an order to conform to the rulings of this Court.

Respectfully submitted,

FRED C. NEWMAN
NEWMAN & MACKAY
510 Stoddard Building
Lansing, Michigan 48933
Attorneys for Petitioners

PHILIP B. KURLAND
Two First National Plaza
Chicago, Illinois 60603
Telephone: (312) 372-2345
Of Counsel

APPENDICES

APPENDIX "A"

United States Court of Appeals for the Sixth Circuit
Order of February 8, 1978
(Filed February 8, 1978)

Before: CELEBREZZE, PECK and LIVELY, Circuit Judges.

This is an appeal from the district court's desegregation order for the Lansing, Michigan, elementary schools. This court earlier upheld the district court's finding of liability for intentional segregation in *NAACP v. Lansing Board of Education*, 559 F.2d 1042 (6th Cir. 1977). This appeal was submitted to the Court on the briefs and oral arguments of counsel, and the Court has studied the record and is fully advised in the premises.

The Court is of the opinion that the scope of the district court's remedy was not overly broad. The record discloses tha' the remedy is tailored to undo the violations of plaintiffs' constitutional rights found by the district court. While the district court did not specifically make findings on the "incremental segregative effect" of these violations, we conclude that the remedy imposed was only "designed to redress" the effect of the violations found. *Dayton Board of Education* v. *Brinkman*, ... U.S. ....., ... (1977), Slip Opinion at 13-14. The district court did not err in including first and second grade children in the desegregation remedy. Nor did the remedy violate the Equal Educational Opportunities Act of 1974. *Brinkman* v. *Gilligan*, 518 F.2d 853, 856 (6th Cir. 1975)

It is ORDERED that the judgment of the district court be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

APPENDIX "B"

Opinion of Hon. Noel P. Fox re Remedy Stated from the Bench on May 3, 1976

The Court: Time is of the essence. There will be a plan, and it will be implemented, and it has to be implemented as soon as possible. The School Board has had every opportunity from the very beginning of this case — and I urged them time after time to sit down and work out a program. The suggestion of counsel that if they do call a meeting they might have a lot to say indicates that there may be difficulty in agreement, substantial difficulty of agreement.

We have a Plan before us which will eliminate — will remedy the Constitutionally impermissible discriminatory racial segregated practices in the Lansing School District. The Administration says it is workable. It is a plan which is a continuation of the Cluster approach, so have the students, so have the faculty, and it may be the simplest to implement expeditiously.

Dr. Stolee made a substantial contribution to the ultimate modified plan, Defendants' Number I, in that he brought the Administration and the Plaintiffs in the same channel, their thinking, and Dr. Stolee followed the Esch Amendment statutorily. The Esch Amendment is also satisfied by the Defendants' Plan as (205) modified, and I see no further reason why we should delay.

I hereby order that that is the Plan for the Lansing School Board and that the implementation of this Plan go forward immediately to expedite the harmonious and the effective implementation of the remedy to eliminate the Constitutional violations.

• • •

APPENDIX "C"

Order Regarding Final Desegregation Plan

(United States District Court — Western District of Michigan — Southern Division)

G305-72 C. A.

Having previously ruled and found that the Lansing Board of Education, through its acts and omissions, has created and maintained a segregated dual school system in violation of the Constitution and laws of the United States and the Constitution of the State of Michigan, and

Having considered all of the evidence submitted and testimony presented relative to development of a remedial plan for elimination of constitutionally impermissible discriminatory racial segregation in Lansing public schools,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Desegregation Plan submitted to the court on May 3, 1976 (designated in evidence as "Defendant's Plan No. 1," as revised by plaintiffs), a copy of which is attached hereto, shall be implemented in all respects for fall semester, 1976.

IT IS FURTHER ORDERED that the Lansing Board of Education, its agents and employees, shall immediately begin all necessary planning, analysis, and other steps necessary to implement said plan.

IT IS FURTHER ORDERED that the Lansing Board of Education diligently seek all state and federal resources available to assist in the implementation of this order. Specifically, but not exclusively,

(1) the Lansing Board of Education shall cooperate fully with the Community Relations Service of the U.S. Department of Justice, which has agreed to advise and assist in the implementation of the plan, and

(2) the Lansing School District shall apply for and utilize all resources available under the Emergency School Aid Act to assist in program development and implementation.

The Lansing School District is directed to seek the assistance of the Michigan State Department of Education in procuring state and federal auxiliary resources. The U.S. Department of Health, Education and Welfare is strongly urged to disburse all funds available for these purposes, and particularly to insure that no net reduction in funding occurs during implementation of this plan.

IT IS FURTHER ORDERED that the Lansing Board of Education carry out all aspects of the Order of this court in good faith and that annual demographic and educational reviews be conducted and used as the basis for making appropriate adjustments toward fulfilling the intent of this court's order.

The court retains continuing jurisdiction to supervise implementation of the plan. Any party may move for amendment or alteration of the plan from time to time if there is a change in circumstances. The party moving for such modification shall have the burden of justifying the changes.

NOEL P. FOX
Chief Judge,
United States District Court

Dated: May 18, 1976

DESEGREGATION PLAN

LANSING SCHOOL DISTRICT

CLUSTER I

Elmhurst 28% Minority (5-6)

All 5-6 students remain at Elmhurst
Assign all 1-4 students to Lewton (.44 or 135) and Main (.56 or 170)

Lewton 21% Minority (1-4)

All 1-4 students remain at Lewton
Assign all 5-6 students to Elmhurst

Main 29% Minority (1-4)

Retains .5 of their 1-4 students (70), sending .5 of their 1-4 students to Lewton (70)
All 5-6 students to Elmhurst

CLUSTER II

Cavanaugh 32% Minority (1-4)

All 1-4 students remain at Cavanaugh
Assign all 5-6 students to Riddle

Everett 36% Minority (1-4)

All 1-4 students remain at Everett
Assign all 5-6 students to Riddle

Kendon 38% Minority (1-4)

All 1-4 students remain at Kendon
Assign all 5-6 students to Riddle

Maple Hill 30% Minority (1-4)

All 1-4 students remain at Maple Hill
Assign all 5-6 students to Riddle

Riddle 32% Minority (5-6)

Assign .25 of 1-4 students to Cavanaugh
Assign .3 of 1-4 students to Kendon
Assign .3 of 1-4 students to Everett
Assign .15 of 1-4 students to Maple Hill
All 5-6 students remain at Riddle

CLUSTER III

Cedar 40% Minority (1-4)

All 1-4 students remain at Cedar
Assign all 5-6 students to Grand River

Grand River 31% Minority (5-6)

Assign all 1-4 students to Post Oak
All 5-6 students remain at Grand River

Post Oak 30% Minority (1-4)

Assign .18 of 1-4 students to Cedar
Keep .82 of 1-4 students at Post Oak
Assign all 5-6 students to Grand River

CLUSTER IV

Genesee 27% Minority (4-6)

Assign all 1-3 students to Gunnisonville
All 4-6 students remain at Genesee

Gunnisonville 28% Minority (1-3)

All 1-3 students remain at Gunnisonville
Assign all 4-6 students to Genesee

CLUSTER V

Horsebrook 19% Minority (1-4)

All 1-4 students remain at Horsebrook
Assign all 5-6 students to Valley Farms

Valley Farms 26% Minority (5-6)

Assign all 1-4 students to Horsebrook
All 5-6 students remain at Valley Farms

Willow 28% Minority (1-4)

Assign .25 of 1-4 students to Horsebrook
Keep .75 of 1-4 students at Willow
Assign all 5-6 students to Valley Farms

CLUSTER VI

Allen 28% Minority (1-4)

Assign .33 of 1-4 students to Fairview
Keep .66 of 1-4 students at Allen
Assign all 5-6 students to Mt. Hope

Fairview 18% Minority (1-4)

All 1-4 students remain at Fairview
Assign all 5-6 students to Mt. Hope

Holmes 39% Minority (1-4)

All 1-4 students remain at Holmes
Assign all 5-6 students to Mt. Hope

Mt. Hope 29% Minority (5-6)

Assign .66 of 1-4 students to Allen
Assign .33 of 1-4 students to Holmes
All 5-6 students remain at Mt. Hope

I. ELMHURST — LEWTON — MAIN GROUPING

		Elmhurst	Lewton	Main
	K	5-6	1-4	1-4
Elmhurst	105	130	135	110
Lewton	45	50	125	
Main	45	70	70	70
		250	330	240
% Minority (1-6)		28%	21%	29%

II. CAVANAUGH — EVERETT — KENDON — MAPLE HILL — RIDDLE GROUPING

		Cavanaugh	Everett	Kendon	Maple Hill	Riddle
	K	1-4	1-4	1-4	1-4	5-6
Cavanaugh	50	170				90
Everett	55		180			90
Kendon	55			165		85
Maple Hill	30				115	50
Riddle	95	80	100	100	50	145
		250	280	265	165	460
% Minority		32%	36%	38%	30%	32%

III. CEDAR — GRAND RIVER — POST OAK GROUPING

		Cedar	Post Oak	Grand River
	K	1-4	1-4	5-6
Cedar	20	80		30
Grand River	85		255	120
Post Oak	75	35	165	100
		115	420	250
% Minority		40%	30%	31%

IV. GENESEE — GUNNISONVILLE PAIRING

		Genesee	Gunnisonville
	K	4-6	1-3
Genesee	55	145	125
Gunnisonville	45	110	105
		255	230
% Minority (1-6)		28%	27%

V. HORSEBROOK — VALLEY FARMS — WILLOW GROUPING

		Horstbrook	Willow	Valley Farms
	K	1-4	1-4	5-6
Horsebrook	30	90		40
Valley Farms	65		120	60
Willow	100	65	200	130
		155	320	230
% Minority (1-6)		19%	28%	26%

VI. ALLEN — FAIRVIEW — HOLMES — MT. HOPE GROUPING

		Allen	Fairview	Holmes	Mt. Hope
	K	1-4	1-4	1-4	5-6
Allen	55	125	60		90
Fairview	50		160		85
Holmes	55			200	100
Mt. Hope	70	165		80	105
		290	220	280	380
% Minority (1-6)		28%	18%	39%	29%

APPENDIX "D"

Excerpts from Testimony of Dr. I. Carl Candoli, Superintendent of Schools of Lansing School District

Q. And was it also your understanding from what Judge Fox (381)* said that each of the schools that did not comply with the 10 percent, 45 percent guideline were schools that would have to be brought into the Cluster Program?

A. Yes. My understanding was — and I believe in response again to a question — that this plan was to finally handle any problems existent in the total School System. In other words, the response was to be such that it would completely resolve the issue of imbalance in the Lansing Elementary System.

Q. Within those guidelines of 10 to 45 percent?

A. Yes. And again I understand it was within those guidelines, right.

---

* Number appearing in parentheses in text indicates page number of original stenographic transcript of testimony.